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In the Supreme Court of the United States

OCTOBER TERM, 1967

EFRAIN SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 385 F.2d 43.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1967. A petition for rehearing was denied on December 1, 1967. Mr. Justice Marshall extended the time for filing a petition for a writ of

certiorari to January 15, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements by co-conspirators were properly admitted against petitioner.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on five counts of an indictment which charged unlawful conspiracies to transfer marijuana (two counts), illegal transfer of marijuana on two occasions, and failure to pay the required tax upon becoming a transferee of marijuana, all in violation of 18 U.S.C. 371, 26 U.S.C. 4742(a), and 26 U.S.C. 4744(a)(1). Four other persons were charged along with petitioner—two Arroyo brothers, Morales, and DeJesus. The two Arroyos entered pleas of guilty to a conspiracy count before petitioner's trial commenced. Morales and DeJesus went to trial with petitioner, but, shortly before the case was submitted to the jury, they changed their pleas to guilty on the conspiracy charge (R. 223). After the jury found petitioner guilty on all counts, he was sentenced to imprisonment for five years.

1. Two illegal transactions were involved. The government's evidence was presented largely through Narcotics Agent Coulter who recounted the events in chronological order. He testified that, with the aid of

an informant, he obtained an introduction to the Arroyo brothers in Chicago. On April 16, 1966, in an effort to purchase marijuana, Coulter, the informant, and the two Arroyo brothers drove to East Chicago, Indiana (R. 98). After their arrival, Coulter said he had $300 to spend for marijuana and Raymond Arroyo said that he would "go to see Santos", the petitioner, to get the marijuana (R. 100, 104).

Petitioner was located driving his Ford convertible (R. 106) and Raymond Arroyo spoke with him. After that conversation, the group followed petitioner's car to the immediate vicinity of the Frontier Bar (R. 107), where Raymond Arroyo again spoke to petitioner (R. 107), and then returned to the Coulter car. He said that petitioner had to send someone for the marijuana, but he needed $50 "out front" (R. 110)—*i.e.*, an earnest-money deposit. Coulter gave Raymond the $50 (R. 110). Coulter watched Raymond recross the street to where petitioner was standing. Raymond had the money in his hand. Raymond's hand met petitioner's and then petitioner placed his hand in his pocket (R. 110-111). Petitioner left, walked a few feet, and then entered a doorway south of the Frontier Bar. When Raymond returned to the Coulter car he no longer had the money in his hand (R. 112).

About thirty minutes later, Coulter saw Raymond go into the same doorway that petitioner had entered (R. 113). He came out with a man named Morales (R. 113). After some delay, Coulter gave an additional $250 to Raymond, then seated in the car

(R. 115). A few minutes later, Morales delivered a quantity of marijuana and, in turn, received money from Raymond (R. 116). After the delivery Raymond became angry that the quantity of marijuana delivered was in excess of the order (R. 116, 117). He told Coulter, "Just a minute, I have to go straighten it out with Santos" (R. 116). Raymond entered the same south doorway that petitioner had used and later expressed satisfaction as to the adjustment of his complaint (R. 117).

2. On May 4, 1966, Coulter and his group returned to the Frontier Bar area. Raymond said he would "go down to Santos' place" to see if he had any marijuana (R. 126). When Raymond returned, he told Coulter that petitioner had only 1½ pounds of marijuana left (R. 127). Coulter refused the offering price quoted to him, but offered a lesser sum. Raymond then said "he would go to talk with Santos" (R. 128). Raymond was again seen with petitioner coming out of the doorway south of the Frontier Bar (R. 192).

Approximately ten minutes after Raymond's departure, Coulter saw Raymond and petitioner talking outside the restaurant (R. 130). Petitioner entered, and greeted the second Arroyo brother and the informant. He then spoke to DeJesus, another patron in the restaurant (R. 130). Petitioner and DeJesus left together and met Raymond outside the cafe.

Fifteen minutes later, petitioner came back in and said in Spanish, "Everything is ready, get going"

(R. 131). Coulter went to his car. Petitioner stood and watched the Coulter car (R. 134). A short time later, DeJesus and Raymond Arroyo came to the car and DeJesus placed a brown bag containing marijuana in the car. Petitioner and DeJesus then walked off together (R. 134) and entered the same south doorway used on the previous visit (R. 135).

Another narcotics agent, Cruz, observed the scenes which have been described and corroborated the testimony of Coulter to the extent that he was physically able to do so from his somewhat more distant vantage point (R. 176-194).

ARGUMENT

Petitioner challenges the admission of agent Coulter's narration of what other participants had said to him or had told him petitioner had said to them. Although, admittedly, some of his testimony was hearsay, it is well established that declarations of a co-conspirator, made during and in furtherance of a conspiracy, are admissible against all who are shown, by independent evidence, to be members of the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604, 607. Like other exceptions to the hearsay rule, this does not involve a denial of the constitutional right to confrontation of witnesses. The agent who heard the declaration testified; he was subject to cross-examination, and his credibility was tested. Moreover, while petitioner points out that since the Arroyo brothers had already entered guilty pleas they might

have been compelled to give direct testimony,[1] petitioner does not deny that these witnesses were equally accessible to him, if the accuracy of agent Coulter's testimony was suspect.

1. In order for declarations of a co-conspirator to be admissible against a defendant, there must be evidence independent of the declarations that the defendant was a member of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74. Here, as the court below found, there was ample independent evidence that petitioner was indeed a party to conspiracy to traffic in narcotics. He talked to Raymond Arroyo before Coulter gave Raymond the $50 deposit money; he evidently received this earnest money; he used the doorway from which the marijuana was later delivered on April 16. The concurrence of these facts constituted independent *prima facie* evidence of his status as a conspirator. Similarly, the circumstances of the second sale, including petitioner's talking with Raymond, his leaving with DeJesus, his direction to the others to "get going", and his observation of the delivery, also indicated his membership in the conspiracy. Thus Raymond's declarations as to what petitioner had told him during the negotiations for the sales were properly admissible against petitioner.

2. Petitioner also challenges the order of proof at trial, arguing that there was no proof of his participation in the conspiracy at the time Coulter was per-

[1] They had, however, entered guilty pleas to only one count of the indictment.

mitted to testify to Raymond's initial statements identifying petitioner as his source of supply and conveying petitioner's demand for earnest money. The order of proof in a conspiracy case is necessarily left to the discretion of the trial court. *Strauss* v. *United States*, 311 F.2d 926, 931 (C.A. 5), certiorari denied, 373 U.S. 910. So long as the evidence ultimately established a basis for admitting against petitioner the declarations by his co-conspirators, petitioner can point to no legal prejudice. In this case, where the principal witness was a participant in the events, it was clearly proper for him to be allowed to relate them in chronological order.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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